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FISHER WAYLAND COOPER LEADER & ZARAGOZA L.L.P.
2001 PENNSYLVANIA AVENUE, N.W.
SUITE 400

WASHINGTON, D.C. 20006-1851
TELEPHONE (202) 659-3494

KATHRYN R. SCHMELTZER
(202) 775-3547

FACSIMILE
(202) 296-6518

INTERNET
kschmeltzer@fwclz.com

WEBSITE
<http://www.fwclz.com>

March 4, 1999

RECEIVED

MAR 4 1999

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
Portals II
445 Twelfth Street, S.W.
TW-A325
Washington, D.C. 20554

Re: MM Docket No. 98-204
MM Docket No. 96-16
Comments of The Curators of the University of Missouri

Dear Ms. Roman Salas:

It has come to the attention of undersigned counsel that at least some copies of the Comments that were filed on behalf of The Curators of the University of Missouri on March 1, 1999 in the above-referenced docketed rule making proceeding were missing page 11. Attached hereto is a corrected copy of the Comments. No changes have been made other than to supply the missing page.

If there are any questions concerning this matter, please communicate with the undersigned.

Very truly yours,


Kathryn R. Schmeltzer

KRS:msc

Attach.

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cc: (See Attached)

ATTACHMENT

The Honorable William E. Kennard
Chairman
Federal Communications Commission
445 12th Street, SW
Room 8-B210
Washington, DC 20554

The Honorable Susan Ness
Commissioner
Federal Communications Commission
445 12th Street, SW
Room 8-B115
Washington, DC 20554

The Honorable Harold Furchtgott-Roth
Commissioner
Federal Communications Commission
445 12th Street, SW
Room 8-A302
Washington, DC 20554

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Commissioner
Federal Communications Commission
445 12th Street, SW
Room 8-A204
Washington, DC 20554

The Honorable Gloria Tristani
Commisisoner
Federal Communications Commission
445 12th Street, SW
Room 8-C302
Washington, DC 20554

Roy J. Stewart, Esq.
Chief, Mass Media Bureau
Federal Communication Commission
445 12th Street, SW
Room 2-C347
Washington, DC 20554

David E. Honig, Esq.
3636 16th Street, N.W.
Suite B-366
Washington, D.C. 20010

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

CORRECTED COPY OF COMMENTS

In the Matter of)	
)	
Review of the Commission's)	
Broadcast and Cable)	MM Docket No. 98-204
Equal Employment Opportunity)	
Rules and Policies)	
and)	MM Docket No. 96-16
Termination of the)	
EEO Streamlining Proceeding)	

To: The Commission

**COMMENTS OF THE CURATORS
OF THE UNIVERSITY OF MISSOURI**

Respectfully submitted,

**THE CURATORS OF THE UNIVERSITY OF
MISSOURI**

**By: Kathryn R. Schmeltzer
David K. McGraw**

SUMMARY

The Curators of the University of Missouri, a public corporation (hereinafter, the "Curators" or the "University"), hereby submits its Comments in the FCC rule making proceeding which seeks to review the Commission's EEO rule and policies. The FCC originally initiated its rule making on streamlining the EEO rule and policies in 1994 and then in 1996 initiated a further rule making on EEO. The latest Notice of Proposed Rule Making stems from the U.S. Court of Appeals decision in Lutheran Church - Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir.), reh. denied, 154 F.2d 487 (D.C. Cir.), reh. en banc denied, 154 F.3d 494 (D.C.Cir. 1998). The University has participated in the FCC's EEO rule making proceedings at all stages since 1994.

The University urges the Commission to recognize the unique characteristics of public educational institutions in adopting any new rules and policies. As a federal contractor, the University already complies with employment regulations issued by the Office of Federal Contract Compliance ("OFCCP"). Compliance with a separate set of FCC regulations has generated a great deal of paperwork and personnel time. Thus, the University submits that public educational institutions that are also federal contractors should be exempt from any FCC EEO rule. Moreover, the radio and television stations licensed to academic institutions serve a unique educational role. These stations hire students as interns and part-time employees and sometimes promote qualified student interns to full-time positions. In large part, the broadcast stations licensed to educational institutions serve as a training ground for the entire broadcast community. This purpose must be recognized and the academic nature of the program involved should result in the exemption of stations licensed to public educational institutions from the FCC's EEO rule.

In addition, the rules proposed by the Commission are unlikely to survive constitutional scrutiny. The Commission would require that stations use minority and female specific sources of recruitment, keep records of the race and gender of the applicant for each job and analyze the racial composition of applicants and the labor force as a whole. The proposed procedure is the kind of program that the United States Court of Appeals for the D.C. Circuit stated it “rather doubt[ed] would be exempt from strict scrutiny under the Fifth Amendment.” Lutheran Church, 141 F.3d at 351.

EEO matters should be left in the hands of those best equipped to resolve them - namely the EEOC, state employment agencies and the federal courts. It does not make sense for the FCC to attempt to duplicate the efforts of these bodies with the expertise and the jurisdiction to handle EEO complaints. When and if a final adverse determination of an EEO violation is made by the EEOC, a state agency or the federal courts, the FCC can at that time take any necessary steps based on the severity of the misconduct involved. Adopting such a course is consistent with FCC practice in other areas such as antitrust matters and will conserve the use of FCC personnel.

The Commission can and should encourage broadcasters to participate in joint outreach programs such as the “Model Broadcast Careers Road Map” created by the Broadcast Executive Director’s Association. This program would make use of the Internet to provide information to potential job applicants. The University notes that educational institutions have been in the forefront of Internet use and such a joint outreach program would enhance the University’s current use of the Internet as a recruiting tool for job applicants.

BEFORE THE
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To: The Commission

**COMMENTS OF THE CURATORS
OF THE UNIVERSITY OF MISSOURI**

The Curators of the University of Missouri, a public corporation (hereinafter, the "Curators" or the "University"), by its attorneys, hereby submit comments in response to the above-captioned Notice of Proposed Rule Making (the "NPRM"), 63 Fed. Reg. 66104, released November 20, 1998.

I. INTRODUCTION

1. The University of Missouri is the state university of Missouri, established by Article IX, Section 9 of the Missouri Constitution and governed by a Board of Curators whose members are appointed by the governor and confirmed by the Senate. The University of Missouri is the oldest land grant institution west of the Mississippi River and was established by the State of Missouri to fulfill a mission of teaching, research, and service for the citizens of the state and for the nation. The University pursues its mission of teaching students and serving the citizens in

in material part through its role as the licensee of commercial television station KOMU-TV, Channel 8, Columbia, Missouri and noncommercial educational FM broadcast stations KBIA(FM), Columbia, Missouri, KCOU(FM), Columbia, Missouri, KUMR(FM), Rolla, Missouri, KMNR(FM), Rolla, Missouri, KWMU(FM), St. Louis, Missouri, and KCUR-FM, Kansas City, Missouri. These stations are an integral part of the University community and have strong records of public service in their communities. Each serves as a training ground for University students, including those students enrolled in the University's renowned School of Journalism in Columbia. The stations provide an opportunity for many students to garner first-hand experience in the operations of radio and television stations. The University has received national recognition and media attention for the substantial role it plays in training students for careers in broadcasting. Indeed, KOMU-TV, Channel 8, an NBC network affiliate, appears to be one of the only, if not the only, VHF commercial television station licensed to a public educational institution in the United States. Many of the students who have worked at KOMU-TV and/or at the University's radio stations have gone on to gain employment at other stations across the country, to top-level positions in the industry, and to the major networks.

2. In the NPRM, the Commission seeks comment on the Commission's efforts to formulate a new equal employment opportunity ("EEO") rule and related policies. The Curators welcome the opportunity to address certain problem areas posed by the proposed EEO rules, especially for "distinctively situated" public educational institutions.

3. The Curators support the Commission's goals of eliminating employment discrimination and increasing the opportunities for women and minorities to advance in the broadcast industry. However, the Curators are concerned that the EEO rules as proposed in the

NPRM may not survive constitutional scrutiny, will create expensive, time-consuming and unnecessary paperwork, and will cause hardships for public educational institutions which are licensees of broadcast stations.

4. The Curators share the Commission's goals of eliminating employment discrimination, promoting workplace diversity and providing programming that is of interest to all members of the broadcasters' communities. However, the Commission should be aware of the unique circumstances of public educational institutions which are licensees and should consider the impact of its rules on such broadcasters. Further, the Commission must craft an EEO rule that is not in conflict with the Fifth Amendment of the United States Constitution. The Curators also urge the Commission to avoid rules that would create unnecessary administrative and paperwork burdens. The Curators submit that the Commission should rely on the Equal Employment Opportunity Commission ("EEOC"), state employment agencies, and the courts for enforcement of employment discrimination complaints.

II. DISCUSSION

A. The FCC Must Consider The Distinct Hiring Situation of Public Educational Institutions

1. Public Educational Institutions Which Are Federal Contractors Must Meet OFCCP EEO Guidelines

5. Employers such as the University of Missouri are subject to certain federal EEO requirements such as the employment regulations issued by the Office of Federal Contract Compliance ("OFCCP"). The OFCCP is responsible for enforcing the EEO requirements for those employers, like the University of Missouri, who are federal contractors. Significantly, the OFCCP regulations differ from those previously used by the FCC and from those rules proposed in the

NPRM. The OFCCP bases its EEO requirements on the number of minorities and women with the skills to perform the jobs for which the licensee has vacancies.

6. The imposition of a separate set of EEO rules from the federal government, via the Federal Communications Commission, is unnecessarily duplicative and imposes substantial burdens on licensees who are public institutions. Because the OFCCP rules differ from the FCC rules, the University has had to develop two sets of guidelines which have occupied substantial staff resources and resulted in substantial paperwork. Under the proposed rules, licensees such as the University will again be burdened with two sets of EEO regulations utilizing different record-keeping mechanisms and different compliance standards from two different federal agencies. The possibility for confusion is enormous because of the volumes of record-keeping, statistical analyses, and other paperwork that will be required. Therefore, the University submits that the Commission should exempt public educational institutions that are also federal contractors from Commission requirements because they are required to meet OFCCP EEO guidelines.

2. Academic Institutions Must Balance Competing Goals in Hiring Personnel

7. Unlike more traditional broadcast stations, those licensed to educational institutions focus on teaching and learning as well as operating the station. For example, every member of the full-time staff at KOMU-TV is involved in the educational process of training the many student interns at the station. Some staff members have academic appointments in addition to their work at the station, and many of the station's employees are teaching assistants and graduate teaching assistants. To fulfill its purpose as a teaching facility, KOMU-TV has between

40 and 60 student interns each semester. These interns are not selected from the population at large, but are University of Missouri students who have enrolled in particular University courses relating to television. For insurance purposes all of these individuals are placed on the KOMU-TV payroll as part-time employees, and therefore are a part of its employment recruitment and hiring statistics. In this connection, the Curators are concerned that the NPRM appears to place the same requirements on part-time hires as on full-time hires despite the FCC's prior statements that it was not interested in part-time hires. As long ago as 1994, the FCC specifically stated that "[t]he Commission's primary enforcement policies focus on minorities and women employed on a full-time basis." See Implementation of Commission's Equal Enforcement Opportunity Rules, MM Docket No. 94-34, 9 FCC Rcd 2047, 2050 (1994) (EEO Notice of Inquiry). See also Order and Notice of Proposed Rule Making in the matter of Streamlining Broadcast EEO Rules, Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission's Rules To Include EEO Forfeiture Guidelines, 11 FCC Rcd 5154, 5174 n. 52 (1996). KOMU-TV also hires two or three full-time employees each year from the ranks of the student interns to supervise the incoming student interns. KOMU-TV selects the most qualified interns from the current pool for these positions.

8. Because of their academic connection, the Curators' stations do not have as many "job openings" for which they can recruit from the general population and create a "pool" of applicants from which to hire. Individuals attracted to positions at the University's stations frequently possess academic backgrounds and desire employment in an academic setting. The pool of qualified applicants is thus more narrow than that reflected by the FCC population statistics.

9. As both Commission licensees and the governing body of a public institution, the Curators are in a situation quite different from that of other Commission licensees. Not only must the Curators meet previously established hiring guidelines, but they face hiring obstacles related to their academic requirements and financial restrictions. The Curators are not in a position to authorize the employment of a number of individuals from the general population who have no experience, background or interest in teaching or working in an academic environment. For these reasons, public educational institutions should be exempt from the Commission's new recruitment and hiring requirements.

III. THE COMMISSION'S PROPOSED RULES MAY BE UNCONSTITUTIONAL

10. The Supreme Court has held that government actions that impose racial classifications are to be analyzed under strict scrutiny, in other words, such classifications are unconstitutional unless they are narrowly tailored to further compelling governmental interests. *Adarand v. Peña*, 515 U.S. 200, 227, 115 S. Ct. 2097 at 2113 (1995). In *Lutheran Church*, the United States Court of Appeals for the District of Columbia Circuit held the FCC's then-existing affirmative action regulations for broadcasters to be unconstitutional under the Equal Protection Clause of the Fifth Amendment. *Lutheran Church- Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir.), *reh. denied*, 154 F.3d 487 (D.C. Cir.), *reh. en banc denied* 154 F.3d 494 (D.C. Cir. 1998) ("*Lutheran Church*"). The Court's reasoning was that the regulations influenced ultimate hiring decisions by broadcast licensees and coerced broadcasters to meet numerical goals for hiring minorities and women. *Id.* at 351, 352. Since the Commission's rules were not justified by a

compelling governmental interest, nor narrowly tailored to achieve any such interest, they were unconstitutional under the Fifth Amendment. *Id.* at 356.

11. While supporting the Commission's goals, the Curators have a concern as to the constitutionality of the affirmative action requirements for recruitment proposed in the NPRM. Specifically, the proposed requirement that stations use a specific number of recruitment sources, including "minority and female specific sources," followed by a requirement that the stations conduct formal analyses of the success of each source used with respect to minority and women referrals, pressures licensees to be race-conscious in hiring. Further, the Commission has suggested that broadcasters be required to "demonstrate that their efforts attract a broad cross section of qualified applicants." Such requirements would force stations to keep records of the race and gender of each applicant for each job and also to analyze the racial compositions of applicants and the labor force as a whole to determine whether a cross section has been achieved. The reporting of such data to the Commission will open the door for third parties to file petitions to deny against applicants on the basis of the information reported. Thus, the proposal would burden the broadcasters with additional recordkeeping and would pressure the stations to make race-conscious hiring decisions. Such a requirement is unlikely to withstand constitutional scrutiny.

12. Similarly, the Commission's proposal that stations be required to record, file with the Commission, and place in their public inspection files, annual workforce data including the race and gender of their workforces would likewise cause increased paperwork burdens and pressure stations to make race-conscious hiring decisions. Likewise, a number of other proposals, including requirements that stations conduct continual analyses focusing on race and gender of

their seniority practices, their fringe benefit policies, their dealings with labor unions, and their selection techniques or tests, would add to the station's workload and force the stations to become race conscious in hiring decisions.

**IV. THE COMMISSION SHOULD DEFER TO THE EEOC,
STATE EMPLOYMENT AGENCIES, AND THE COURTS**

**A. The Commission Should Rely on the Eeoc and State
Employment Agencies for Resolution of Discrimination
Complaints**

13. The Curators support the Commission's position that employment discrimination should be prohibited in broadcasting. However, the United States Equal Employment Opportunity Commission ("EEOC") is the entity with the expertise and explicit authority to resolve individual employment discrimination complaints, and thus the Commission should defer to its authority in such matters. The EEOC handles employment discrimination cases on a routine basis, and has established procedures, competent personnel and institutional knowledge to assist it in dealing with such issues, while the FCC has little experience in resolving such cases. While the Commission has proposed to defer "individual complaints of employment discrimination against broadcast licensees" to the EEOC, it has also suggested that it retain discretion to consider such complaints itself. The Curators submit that there is no need nor grounds for the FCC to duplicate the efforts of another agency with the resources and the expertise to resolve discrimination complaints nor to reopen cases already resolved by the EEOC which would result in redundant litigation. Such a situation increases the litigation expenses for all parties, and could lead to different results issued from two federal agencies concerning the same factual allegations.

14. Similarly, state employment agencies possess expertise in employment discrimination matters. Second guessing of state employment agency decisions exposes broadcasters to needless litigation expense, and the spectre of differing determinations by the state agencies and the FCC causes thorny jurisdictional questions. The FCC should rely on factual determinations made by the EEOC and the appropriate state employment authorities. When individual employment discrimination complaints are lodged, the EEOC or appropriate state agency should first address the complaint. If the EEOC or state agency issues an order concerning a discrimination complaint against a broadcaster which has become final, the FCC can then determine the appropriate sanction, if any, to impose on the broadcaster.

15. Likewise, the FCC should also rely on the EEOC's expertise for cases alleging patterns of discriminatory behavior. Just as the EEOC is the body with the expertise and explicit authority to properly resolve complaints of individual employment discrimination, it has even more expertise in resolving cases alleging patterns of discrimination, a realm in which the EEOC's regulatory experience is especially necessary. There is no reason for the Commission to forward individual discrimination cases to the EEOC, but ignore the wealth of "pattern" discrimination experience of that agency in favor of creating a new enforcement mechanism within the FCC.

**B. The Commission Should Defer to the Decisions Of Courts
in Discrimination Cases**

16. The Curators believe that the Commission should make a clear statement that it will uphold the ruling of a competent court with respect to employment discrimination claims. The Commission should not permit individuals who have lost their discrimination claims in court to seek to use the Commission as a new venue for the relitigation of their complaints. Entertaining

such complaints not only wastes the resources of the Commission and exposes broadcasters to increased legal expenses, it is in violation of the constitutional requirement that administrative agencies afford the decisions of Article III courts full faith and credit and makes a mockery of the judgments of the courts.

17. The Curators are well aware of the expenses that may be necessary to relitigate an employment discrimination complaint previously decided by a court of law. Station KWMU(FM), St. Louis, Missouri, licensed to The Curators, has seen its 1996 license renewal application delayed for more than two years because of a complaint filed by the Rainbow/PUSH Coalition which repeats allegations of discrimination that a former part-time employee of the station lost in federal court many years ago. After losing her case in the local district court, this individual did not appeal. The Curators believe that it is unfair for the FCC to permit a broadcaster to be exposed to enormous legal expenses and permit the license to be held hostage for years based on complaints that were heard and found to be groundless in a federal court of competent jurisdiction. The Commission should issue clear rules stating that matters resolved by a competent court should not be open to relitigation at the Commission.

C. The Commission Should Consider the Size of the Organization in Evaluating Employment Discrimination Matters

18. In evaluating employment discrimination matters involving a licensee or its parent organization, the Commission should take into consideration the size of the organization in assessing whether a decision as to discrimination should be weighed against the licensee. In larger organizations, the existence of complaints and even an adverse resolution of a complaint is much

more likely than in small organizations.¹ The Curators submit that it would be unfair to automatically designate a license renewal for a hearing just because there has been an adverse final decision in a discrimination case. All of the facts and circumstances should first be considered.

19. The NPRM also seeks comment on the type of evidence that the Commission should consider as "probative of discrimination." Included in the examples provided are the following: "evidence derived from logical inferences of potential discrimination drawn from a licensee's irrational explanations to the Commission for EEO nonperformance, *e.g.*, claims that minorities prefer not to work in a particular format or that minorities and women prefer occupations outside of broadcasting." (NPRM at. para. 60). However, the Commission cannot find evidence probative of discrimination based on what a petitioner to deny believes are "irrational" arguments. Licensees must be free to be guided by their counsel in rebutting an allegation of discrimination without fearing that the explanation itself will be viewed as indicative of discrimination. The Court of Appeals has already rejected attempts to find discrimination and lack of candor based on legal defenses offered to rebut charges of discrimination. See, Lutheran Church - Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1998); Florida State Conference of Branches of the NAACP v. FCC, 24 F.3d 271, 274 (D.C. Cir. 1974).

**V. THE COMMISSION SHOULD ENCOURAGE COMPLIANCE
IN JOINT OUTREACH PROGRAMS**

20. The Commission should encourage the actions of broadcasters to participate in joint outreach programs. As an example of such programs, the Broadcast Executive Director's

¹ For instance, a former television anchorwoman at Station WFSB(TV), Channel 3, Hartford, Connecticut recently won an \$8.3 million jury verdict in U.S. District Court in Hartford against Post-Newsweek Stations, Inc. a case where the jury found that she had suffered gender discrimination. See The Washington Post, Saturday, January 30, 1999, p.E3.

Association ("BEDA") has created a "Model Broadcast Careers Road Map," which has been adopted by a number of state broadcast associations. The Model affirms the goals of non-discrimination and workplace diversity, and responds to the need to inform people of all races, ethnic groups, and genders about careers in broadcasting. The Model focuses on educating people, especially young people, about broadcasting careers, maximizing the pools of qualified applicants for all job openings in broadcasting, including applicants from culturally and racially diverse backgrounds, and training employees to promote advancement in the broadcast industry.

21. One key element of the BEDA program is the use of the Internet to provide information to potential job applicants and to permit applicants to post online resumes. The use of Web pages will provide a low-cost, nationwide system for providing immediate information on broadcast job openings to a large, racially diverse pool of applicants and provides a system to which public educational institutions such as the University have ready access.

VI. CONCLUSION

For the foregoing reasons, the Curators of the University of Missouri believe that the Commission's EEO Rule, as proposed, creates unnecessary burdens for public educational institutions. Such institutions should be exempt from the rules if they comply with the OFCCP EEO regulations. The proposed Rule is also unlikely to withstand constitutional scrutiny. The Commission should rely on the enforcement powers of the courts, the EEOC, and appropriate state agencies to ensure that broadcasters do not engage in discriminatory behavior.

Respectfully submitted,

**THE CURATORS OF THE UNIVERSITY OF
MISSOURI**

**FISHER WAYLAND COOPER
LEADER & ZARAGOZA L.L.P.**
2001 Pennsylvania Ave., N.W.
Suite 400
Washington, D.C. 20006-1851
(202) 659-3494

By:



Kathryn R. Schmeltzer

David K. McGraw

Its Attorneys

Dated: March 1, 1999

CERTIFICATE OF SERVICE

I, Margie Sutton Chew, a secretary in the law firm of Fisher Wayland Cooper Leader & Zaragoza L.L.P., do hereby certify that true copies of the foregoing **"COMMENTS OF THE CURATORS OF THE UNIVERSITY OF MISSOURI"** were sent this 1st day of March 1999, by first class United States mail, postage prepaid, to the following:

*The Honorable William E. Kennard
Chairman
Federal Communications Commission
445 12th Street, SW
Room 8-B210
Washington, DC 20554

*The Honorable Susan Ness
Commissioner
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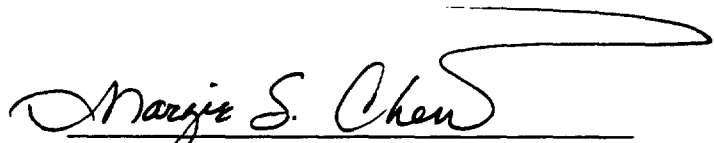
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Federal Communication Commission
445 12th Street, SW
Room 2-C347
Washington, DC 20554

David E. Honig, Esq.
3636 16th Street, N.W.
Suite B-366
Washington, D.C. 20010



Margie Sutton Chew

* Via Hand Delivery